Supreme Court, U.S.
FILED
MAY 19 1993
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92-1892

NO. 92

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM _____

OCTOBER, 1992

ROBERT W. HARRISON, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Robert W. Harrison, Jr.,
Post Office Drawer Eight
102 East Main Street
Folkston, Georgia 31537

(912) 496-2573

Petitioner, Pro Per

36pp

QUESTIONS PRESENTED FOR REVIEW

The Doctrine of Stare Decisis Mandated the District Court Grant Petitioner an Evidentiary Hearing and Vacate His Conviction as Petitioner was Denied Due Process of Law.

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PETITION FOR WRIT OF CERTIORARI

Robert W. Harrison, Jr., appearing Pro Per, respectfully requests the Honorable Court to issue a Writ of Certiorari to review the judgement and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The United States District Court for the Southern District of Georgia, Brunswick Division entered its order on the 4th day of June, 1992. This order with the Magistrate's Report, is reprinted hereto on pages A-1 through A-13.

The United States Court of Appeals For The Eleventh Circuit entered its order affirming the United States District Court on February 24, 1993. This order is reprinted hereto on page A-14.

JURISDICTION

Jurisdiction of this court is invoked pursuant to Title 28 U.S.C. 1254 (1).

The judgement of the United States Court of Appeals for the Eleventh Circuit was entered on February 24, 1993.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be....deprived of life, liberty, or property, without due process of law.....

The Sixth Amendment to the United States Constitution reads in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right....to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

After a three day trial by jury Petitioner was convicted of tax evasion in violation of 26 U.S.C. Section 7201 which was affirmed by the Eleventh Circuit on direct appeal in an unpublished opinion. Following the affirmance of his conviction Petitioner filed a petition for relief pursuant to Title 28 U.S.C. 2255 which was denied by the District Court and affirmed by the United States Court of Appeals for the Eleventh Circuit.

Petitioner alleged in his Petition that he had been deprived of both liberty and property without due process of law and that his trial counsel rendered him ineffective assistance by agreeing and not objection to the use of the video-taped deposition for the key government witness, Steven Berry, without either knowledge or consent of defendant. The District Court denied relief and the Eleventh Circuit affirmed the decision.

REASONS FOR GRANTING THE WRIT

I

THE DECISON OF THE ELEVENTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT VIOLATE THE DOCTRINE OF STARE DECISIS IN THAT THE UNITED STATES PRECLUDED THE PETITIONER FROM EXERCISING HIS SIXTH AMENDMENT RIGHTS IN CONFORMITY WITH THE FUNDAMENTAL FAIRNESS PROVISIONS OF THE FIFTH AMENDMENT

The instant case presents somewhat of a novel question in that the United States advised the District Court prior to trial that its key witness Steven Berry would be unavailable and as such his deposition testimony was necessary. In its moving papers the attorney for the United States stated that counsel for Petitioner concurred with the taking of this deposition when the truth was

that counsel did not agree to the taking of any depositions but objected to taking of depositions see Pages B-1 to B-2. Neither in its moving papers nor in any subsequent document filed by the Untied States did counsel for the United States state that Petitioner was notified and or made aware of the intent of the United States to take depositions of its key witness Steven Berry.

Petitioner filed a pro se petition under Title 28 U.S.C. 2255 alleging that he was denied effective assistance of counsel within the meaning of the Sixth Amendment by the use of the video-taped depositions. Even though the claims were couched as Sixth Amendment claims they were in fact claims for denial of due process within the meaning of the Fifth Amendment to the United States Constitution.

Under Haines v Kerner, 404 U.S. 519, 30 L. Ed. 2d. 652, 92 S. Ct. 594 (1972) the District Court was mandated to so interpret these claims but failed to do so.

This Court has consistently held that the essence of due process is fair play Galvan v Press, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737 (1954) with notice being perhaps the most fundamental of due process rights Morrisey v Brewer, 408 U.S. 471, 489, 33 L. Ed. 2d. 484, 92 S. Ct. 2593, 2604 (1972) see also Baldwin v Hale, 68 U.S. (1 Wall.) 223, 233, 17 L. Ed. 531 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."). This principle of adequate notice is interwoven throughout our system of criminal justice. It applies at all stages of a criminal prosecution, from the

institution of criminal proceeding to sentencing.

Both under the Fifth and Sixth Amendments to the United States Constitution the right to notice is personal to the defendant Faretta v California, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d. 562 (1975). Rule 43 of the Federal Rules of Criminal Procedure presents a "crystallization" of two earlier Supreme Court decisions applying the common law right of presence in federal criminal trials Lewis v United States, 146 U.S. 370, 13 S. Ct. 136, 13 L. Ed. 1011 (1892) and Diaz v United States, 223 U.S. 442, 32 S. Ct. 250, 56 L. Ed. 500 (1912). While Lewis declares the general proposition incorporated in the first sentence of the rule, that "after indictment found, nothing shall be done in the absence of the prisoner," Diaz provided almost verbatim the

exception embodied in the second sentence of Rule 43 Taylor v United States, 414 U.S. 17, 94 S. Ct. 194, 38 L. Ed. 2d. 174 (1973) The two reasons for the general common law right of presence in federal criminal trials are (1) assuring a nondisruptive defendant the opportunity to observe all stages of the trial and (2) guaranteeing the defendant the opportunity to aid in his defense so as to protect the integrity and reliability of the trial mechanism. So long as the defendant has been provided s with the opportunity to be present, neither purpose is thwarted by a defendant's voluntary exercise of his option not to attend. Taylor, supra. s

In the instant case Petitioner filed a petition for relief pursuant to Title 28 U.S.C. 2255 in which he alleged that the video-taped deposition of Steven Berry was

taken without he being made aware of the deposition and without his consent. He also alleged that his trial counsel were unaware of the pending deposition and did not consent to the taking of the deposition but objected to the taking of the depositions as fully set forth, supra.

As the record reveals no waiver of the right to be present during all stages of the criminal proceedings, due process would mandate the Court treat the claims as that for denial of due process and afford Petitioner an evidentiary hearing on his 2255 petition Morrisey, supra.

II

It is a set precedent that the due process clause is applicable to the rights guaranteed by the Sixth Amendment to the United States Constitution Pointer v State Of

Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d. 923 (1965). In other words this court has stated that the rights guaranteed by the Sixth Amendment must be exercised in conformity with the fundamental fairness provisions of the Fifth Amendment.

The District Court and the Eleventh Circuit when analyzing the right to effective assistance of counsel in the instance case, utilized the standard set forth in Strickland v Washington, 466 U.S. 668, 104 S. Ct. 2052, 2070, 80 L. Ed. 2d. 674 (1984) which standard was the wrong standard to apply. Instead the courts should have applied the "fundamental fairness" standards to determine whether the conduct of the United States in the matter "was shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment." United States v

Russell, 411 U.S. 423, 432, 93 S. Ct. 1637, 1643, 36 L. Ed. 2d. 366 (1973).

It certainly cannot be disputed that it was fundamentally unfair for the United States to use deposition testimony of the key government witness after defense counsel objected to such deposition. This satisfies the first prong of the fundamental fairness test.

The second and final prong of the test, to wit, the shocking to the universal sense of justice test is satisfied by the fact that the attorney for the United States in his application to depose the key government witness failed to disclose the fact that chief defense counsel objected to the use of the video-taped deposition. Instead of disclosing this the counsel for the United States stated that the defense counsel agreed to the use of

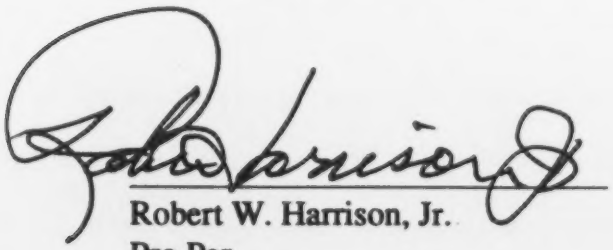
video-taped depostion.

The foregoing coupled with the fact that Petitioner was never afforded any notice of the pending deposition mandated the District Court afford Petitioner an evidentiary hearing on his 2255 petition and vacate the conviction as the proceedings were fundamentally unfair.

CONCLUSION

THEREFORE, Petitioner respectfully prays for this Court to grant the petition and issue the Writ of Certiorari.

Respectfully submitted,



Robert W. Harrison, Jr.
Pro Per

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

ROBERT W. HARRISON, JR., Petitioner,	)	
v.	)	CIVIL ACTION NO.:
UNITED STATES OF AMERICA	)	CV292-16
Respondent	)	

ORDER

After a careful review of the file, the Court concurs with the Magistrate's Report and Recommendation, to which objections have been filed. Accordingly, the Report and Recommendation of the Magistrate is adopted as the opinion of the Court..

The petitioner's Motion to Vacate is DENIED.

SO ORDERED, this 4th day of June, 1992.

FILED
U.S. DISTRICT COURT
BRUNSWICK DIV
JUN 4 11:35 AM '92
Signed
Clerk
SO. DIST. OF GA.

ANTHONY A. ALAIMO, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

ROBERT W. HARRISON, JR., Petitioner, v. UNITED STATES OF AMERICA Respondent	)	CIVIL ACTION NO.: CV292-16

U.S. DISTRICT COURT
BRUNSWICK DIV
MAY 19 1:08 PM '92
Signed
Clerk
SO. DIST. OF GA.

MAGISTRATE'S REPORT AND RECOMMENDATIONS

Petitioner Harrison has filed a Motion to Vacate and Set Aside a Sentence to the provisions of 28 U.S.C. §2255. Respondent Government has filed a Response to the petitioner's Motion. Both parties have filed briefs in support of their pleadings.

STATEMENT OF THE CASE

On July 29, 1988, in this court, petitioner was convicted of two counts of willfully attempting to evade the payment of federal income taxes, in violation of 26 U.S.C. 7201. He was sentenced to serve

one year in confinement on one count and to two years of supervised probation and a $7,500.00 fine on the other count. The Eleventh Circuit Court of Appeals affirmed petitioner's conviction. Petitioner has completed his one-year sentence, and has been released on parole.

The Motion to Vacate presently before this court is the second such action filed by the petitioner. On August 4, 1989, petitioner filed a 28 U.S.C. §2255 Motion to Vacate, in which he alleged that he had received ineffective assistance of council and that he had been denied due process by the improper withholding of evidence by the prosecution. By Order dated August 22, 1989, this court dismissed petitioner's first §2255 motion, stating that all of the allegations of his motion should have been raised upon the appeal of his conviction. This court also found that petitioner's allegations, on their merits,

showed no basis for granting relief or even an evidentiary hearing. On September 26, 1990, the Eleventh Circuit Court of Appeals, *per curiam*, issued an unpublished opinion which affirmed the Order of this court. The Eleventh Circuit addressed and rejected several of the petitioner's individual factual assertions which were subsumed under his ineffective assistance of counsel claim.

Petitions filed his current 28 U.S.C. §2255 Motion on January 22, 1992. He sets forth several claims, based on ineffective assistance of counsel, which he has already made, both on direct appeal of his conviction to the Eleventh Circuit and in his first §2255 Motion. However, petitioner fails to acknowledge that he previously filed a §2255 Motion to Vacate, and thus doe not discuss the effects of

the previous adjudication of the same claims by this court and the Eleventh Circuit Court of Appeals.

Respondent argues that petitioner's current 28 U.S.C. §2255 Motion should be summarily dismissed because it is both abusive of the §2255 remedy and successive. Respondent points out that many of the issues raised by petitioner's previous motion have been previously adjudicated, and that petitioner should not receive a second chance. With regard to the few new claims made by the petitioner, respondent contends that review of these claims should be foreclosed because the petitioner failed to raise them either upon appealing his conviction or in his first §2255 motion. The repondent also contends that since the defendant is no longer incarcerated, he is not in "custody" as is required by 28 U.S.C. §2255.

GROUNDS OF RELIEF

1. Petitioner was denied effective assist -ance of counsel when his trial counsel failed to object to the introduction into evidence of a video-taped depostion of witness Steven Berry, in liew of his testimony at trial.

2. Trial counsel thus failed to conduct an effective cross-examination of witness Berry.

3. Trial counsel also failed to have the video-taped testimony of witness Berry transcribed by the court reporter at trial.

4. Trial counsel failed to cross-examine government witness Guy Purvis, an Internal Revenue Service Agent who became ill during direct examination.

5. Trial counsel failed to adequately investigate the case and present material, exculpatory evidence on his behalf.

6. The government withheld exculpatory evidence from the petitioner in violation of his due process rights.

7. The government denied petitioner his due process rights by advising government witness Marlene Daley to deny that she told defendant, "I hope you rot in hell."

8. The government violated petitioner's due process rights by failing to disclose the existence of an agreement between the United States Attorney's Office and a key prosecution witness.

DISCUSSION AND CITATION OF AUTHORITY

Respondent argues that because petitioner's second Motion to Vacate should be summarily dismissed as successive and as an abuse of the 28 U.S.C. §2255 remedy, none of petitioner's individual grounds of relief need to be adressed on their merits. Petitioner has not responded to these contentions by the respondent.

Pursuant to Rule 9(b) of the Rules Governing Section 2255 Proceedings, a district court may dismiss a successive Motion. Rule 9(b) reads as follows:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds

> that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

However, a district court's direction under Rule 9(b) is not plenary. In Sanders v. United States, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d. 148 (1963), the Supreme Court established two rules for disposing of repetitive 28 U.S.C. §2255 motions. First, a district court may deny such a motion if the grounds set forth therein have previously been adjudicated on their merits. Id. at U.S. 15-17, at S. Ct. ___, at L. Ed. 2d. 161-162; Humphrey v. United States, 766 F. 2d. 1522, 1524 (11th Cir. 1985). Second, when the petitioner presents grounds which have not been raised previously (either in a previous motion or on appeal of his conviction), the district court must address the new grounds unless the petitioner's failure to present those grounds at an earlier time represents an abuse of

the §2255 remedy. Sanders, at U.S. 17-19, at S. Ct. ___, at L. Ed. 2d. 162-163; Humphrey, supra.

Once the issue of abuse is raised by the respondent, the burden shifts to the petitioner to demonstrate that his failure to assert the new grounds at an earlier time does not constitute an abuse. Humphrey, supra. The issue of whether such a second petition constitutes an abuse of the remedy is left for the sound discretion of the district court. Gunn v. Newsome, 881 F. 2d. 949, 957 (11th Cir. 1989). The Supreme Court itself has said, "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation..." Sanders, 373 U.S. at 18, 83 S. Ct. at ___, 10 L. Ed. 2d. at 163.

In the case *sub judice*, the respondent strongly contends that petitioner is abusing the 28 U.S.C. §2255 remedy. Respondent argues that petitioner has had

several opportunities to raise the few new grounds which are in his second §2255 Motion, and has previously set forth most of the grounds therein. It is true that petitioner has appealed his conviction to the Eleventh Circuit and has filed his previous Motion to Vacate, which has likewise appealed to the Eleventh Circuit.

Respondent argues that most of the petitioner's grounds of relief, delineated above, have already been adjudicated on the merits. This is true of all of the separate allegations connected with petitioner's individual allegations that he was denied effective assistance of counsel by holding that these assertions, even if true, were only peripheral to obtaining the petitioner's conviction. Furthermore, most of those claims pertained only to a fraction of the funds petitioner was alleged to have improperly withheld. See Harrison v. United States,

No. 89-8687 (11th Cir. September 26, 1990). The Eleventh Circuit also found that petitioner had not demonstrated that he was prejudiced by any of the alleged inadequacies of his trial counsel, as is required by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984). Harrison, supra.

Petitioner has raised a few new grounds in his current 28 U.S.C. §2255 Motion. First, he asserts that the court reporter failed to transcribe the video-taped deposition of Steven Berry. The respondent is correct in arguing that this allegation is patently false; such a transcript is part of the petitioner's criminal file. See United States v. Harrison, No. CR 288-09 (S. D. Ga. 1988). Second, petitioner asserts that the government improperly withheld his 1982 office records thereby denied him a fair trial. Respondent is correct in arguing

that this allegation, too, is false, as the record reveals that the petitioner was in fact allowed to inspect his law office records prior to his trial. Before the trial, the parties entered into a discovery stipulation which allowed the petitioner to review such records. (See Record, Vol. 1, Pleading 18) Petitioner's new allegations are thus unsupported by the record.

Respondent also argues that the petitioner is abusing the §2255 remedy by raising these new grounds after having had two previous opportunities to do so (i.e., on appeal of his conviction and in his first §2255 Motion). Petitioner is abusing the §2255 remedy by raising these assertions at this time. In this case, the petitioner is not the typical *pro se habeas corpus* applicant, who has a poor understanding of the legal system, but is instead

a lawyer who should have been well aware of the potential ramifications of failing to set forth all of his arguments at the first opportunity. This court need not expend any more of its resources addressing stale claims by this petitioner.

CONCLUSION

For the above and foregoing reasons, it is my Recommendation that petitioner's Motion to Vacate Sentence be DENIED, as being not only successive and abusive, but also without legal merit.

SO REPORTED AND RECOMMENDED, this 19th day of May, 1992.

Signed: James E. Graham
JAMES E. GRAHAM
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8580

Non-Argument Calendar

D.C. Docket Nos. CV292-16,
CR288-9

ROBERT W. HARRISON, JR.,

Petitioner-Apellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(February 24, 1993)

Before FAY and DUBINA, Circuit Judges, and TUTTLE,
Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

Judgement Entered: February 24, 1993
For the Court: Miguel J.Cortez, Clerk

By: Signed: Karleen McNabb
Deputy Clerk

FILED
U.S.COURT OF APPEALS
ELEVENTH CIRCUIT

FEB 24 1993

MIGUEL J. CORTEZ
CLERK

ISSUED AS MANDATE: March 18,1993

GEORGIA , WARE COUNTY

AFFIDAVIT

Personally appeared before me, the undersigned officer, duly authorized by Georgia Law to administer oaths and take acknowledgements, M.C. Pritchard, Esquire, who after being duly sworn deposes and says on his oath that the following facts and matters are true and correct:

1. I am M.C. Pritchard an attorney of Waycross, Georgia duly licensed to practice law in state and federal courts in Georgia and in the United States.

2. I was one of the attorneys representing Robert W. Harrison, Jr., in the case of USA vs. Robert W. Harrison, Jr., (DC No. CR288-09) Eleventh Circuit (No. 88-8579) which was tried in Federal District Court in Brunswick, June 13, 1988.

3. During the time of preparation of the case the Assistant U.S. Attorney, Richard Goolsby, called me on the long distant telephone and requested that he be able to take the testimony of Attorney Steven Berry by video-tape

deposition to be used during the trial. He stated that this was necessary due to the fact that during the trial week the witness, Steve Berry, would be out of the country on vacation.

4. At that time Mr. Goolsby was advised by me that since Mr. Berry was one of the chief witnessess in the case against Mr. Harrison that we could not agree to take his testimony by video tape.

5. I never did agree and so advised defendant, Mr. Robert W. Harrison.

Subscribed and sworn
to before me this 6th
day of December 1988.

Signed: M.C. Pritchard
M.C. Pritchard

Signed: Marie Wainwright
Notary Public

Notary Public, Charlton County, Georgia
My Commission Expires Sept. 19, 1992